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No. 84-701

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., et al.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT

The Court of Appeals held that the proof presented in the District Court in 1976 failed to establish that the land owned by respondent met the subsequently amended regulatory definition of a "Wetland" so as to the subject the land to the regulatory jurisdiction of the United States Army Corps of Engineers (the Corps) under Section 404 of the Clean Water Act

of 1977 (CWA), 33 U.S.C. 1344. The decision below has none of the broad jurisdictional or constitutional impact alleged by Petitioner in its brief. The Court did not invalidate the Corps' regulations delineating its jurisdiction and never held the Corps exceeded its jurisdiction under either the CWA or the Constitution. The Court did not invalidate any portion of the Corps' CWA "wetlands" definition and most certainly never held the Corps could not require and process permits for the fill of those "waters" subject to its jurisdiction. Moreover, the Court did not hold subjecting property to regulation constituted a taking for which compensation was due the owner. Rather, the Court applied the Corps' own definition to the narrow issue before it and held that the proofs presented were insufficient to justify a classification

of the land in question as a CWA "wetland" as defined by the Corps. The decision was correct, entirely consistent with the decisions of other circuits and says nothing either about a taking or about the Corps' Section 404 permit process. Whether by accident or by design, Petitioner misrepresented both the holding and the import of the decision below in its Petition. Accordingly, the focus of the first portion of this brief will be on placing the decision below in its proper context. The second portion will expand on the reasons the Petition should be denied.

1. The land in question. Though the land owned by Respondent has been described in the lower court opinions and in Petitioner's brief, the facts are so unique that they bear repeating. Riverside Bayview Homes, Inc., (Riverside) owns eighty acres of underdeveloped land

in Harrison Township, Michigan, a northeast suburb in the tri-county greater Detroit metropolitan area. The land is approximately a mile west of Lake St. Clair, south of South River Road, which roughly parallels the Clinton River, and east of Jefferson Avenue, a heavily travelled thoroughfare. Its southern boundry is separated from the man-made Savan Drain by two ten acre parcels. (2A, Appendix).[1] The Appendix to the Sixth Circuit's opinion, (19A, Appendix), provides a pictorial description of the property.

The land is comprised of one sixty acre parcel and a partially adjoining twenty acre parcel. The sixty acres fronting Jefferson Avenue had been

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1 Pages 1A through 44A of the Appendix to Petitioner's brief contain the relevant lower court opinions. Pending the filing of a joint appendix references herein to such opinions are based on the Appendix attached to the Petition.

actively farmed along with much of the surrounding area through the early 1900's. In 1916, it was platted as a subdividion. Storm drains and fire hydrants were installed. The twenty acre parcel fronting South River Road was neither platted nor improved. (3A, 22A, Appendix). In the mid 1950's, George Short, who acquired the property to develop the platted subdivision, regularily mowed or burned off dry grass on the property. (Tr. 1-20-77, 95). The land was transfered in 1960 to the newly formed Riverside. Efforts to develop the land in the 1960's along with the surrounding area were stymied by an adjacent property owner, who blocked the rerouting of a street which dissects the property and by a local zoning ordinance which required Riverside to fill the property as a condition for securing

building permits. (3A, Appendix). In the early 1970's, Riverside began filling the property but halted when it discovered the fill being used was ill-suited to its needs. (Tr. 1-20-77, 112).

In 1973, unprecedented high water levels on Lake St. Clair, located a mile east of the Riverside land, prompted emergency action by Harrison Township and the Corps to protect area homes and businesses from water damage. Emergency measures included building a semicircular dike which dissected the twenty acre parcel and extended southwest across the sixty acre tract. Riverside requested that any dike be built along the perimeter of its property. The Corps refused. (Tr. 1-20-77, 92). A pump was installed on the dike to keep the area to the north dry. The pumped water was discharged onto Riverside's property. A ditch along Jefferson Avenue was filled with dirt,

thereby destroying the drainage on the western border of the property. (3A, Appendix). A second and much larger pumping station was installed south of the property at the Savan Drain to lift water from the west side of Jefferson Avenue back to the east side toward Riverside's property. (35A, Appendix).

In furtherance of its development plans, Riverside contracted with Allied Aggregate Transportation Company in the fall of 1976 to haul fill excavated from an area highway project to the property. A Riverside stockholder met with Corps' personnel to discuss its plans. It was unclear whether the land would be subject to the Corps' regulatory jurisdiction. (3A, Appendix). A formal permit application was filed in November, 1976, and Riverside commenced filling the property north of the dike over which the Corps claimed no jurisdiction. A dispute

then arose as to the extent of the Corps' jurisdiction, if any. When Riverside continued to fill, the Corps asked the United States Attorney to bring this action. On January 7, 1977, then District Court Judge Kennedy, entered a Temporary Restraining Order prohibiting further filling pending a full evidentiary hearing. (3-4A, Appendix).

2. The issue before then District Court Judge Kennedy.

The complaint filed in District Court alleged Riverside discharged pollutants on a portion of its property in violation of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.[2] Riverside denied that its property was subject to the

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2 The FWPCA was extensively amended in 1977. One such amendment changed the popular name of the legislation to the Clean Water Act of 1977. See 33 U.S.C. 1251 Historical Note. The amended name will be used thoughout this brief.

provisions of the Clean Water Act (CWA) and requested that the complaint be dismissed.

The CWA, first passed in 1948 but overhauled in 1972, was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters". 33 U.S.C. 1252(a). Congress declared as its objective "that the discharge of pollutants into the navigable waters be eliminated by 1985". 33 U.S.C. 1251(a)(1). Congress, however, recognized that the CWA created a risk of injecting an unwarranted federal presence into matters properly reserved for the States, and acknowledged the primary rights and responsibilities of the States are to make effective land use decisions. 33 U.S.C. 1251 (b).

The substantive provisions of the CWA focus on controlling water pollution, particulary industrial and sewage

pollution from point sources. Section 301, 33 U.S.C. 1342, establishes the National Pollutant Discharge Elimination System (NPDES) which authorizes the basic mechanism for applying various effluent standards to particular discharges. Sections 404, 33 U.S.C. 1344, carves out from this general authority, a specific authority for the Secretary of the Army, acting through the Army Corps of Engineers,[3] to issue permits for the discharge of dredged or fill material from point sources into "navigable waters".

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3 The Environmental Protection Agency (EPA) is generally responsible for administation of the CWA. However, by including dredged spoil, rock, sand and cellar dirt within the definition of pollutants, 33 U.S.C. 1362(6), the CWA created a potential overlap between the EPA's jurisdiction and the Corps' traditional jurisdiction under the Rivers and Harbors Act. 33 U.S.C. 401-413. To eliminate the need to obtain a permit from two government agencies and to maintain in the Corps its traditional jurisdiction, the authority to issue Section 404 permits was vested in the Corps. 118 Cong. Rec. 33699 (1972).

The "navigable waters" into which no pollutant could be discharged, were defined in the CWA only as the "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The CWA did not mention or define "wetlands". The Corps, however, promulgated administrative regulations in which the term "navigable waters" was defined to include: "Freshwater wetlands, including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation." 33 C.F.R. 209.120 (d)(2)(i)(h)(1976). The Corps defined a CWA "freshwatrer wetland" to mean "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. 209.120 (d)(2)(i)(h)(1976).

The question before then District Court Judge Kennedy was whether Riverside's property was a CWA "freshwater wetland" as defined by the Corps. On February 24, 1977, following extensive evidentiary hearings, the Court issued the first of two opinions. Judge Kennendy determined the "prevalence of vegetation" requirement was satisfied. Then she reviewed whether the property was "inundated" and whether that inundation was "periodic". Judge Kennedy candidly acknowledged that it was "the most difficult issue to resolve." (25A, Appendix).

Judge Kennedy found Riverside's land was rarely if ever inundated. Indeed, (28-29A, Appendix) she stated:

> It is immediately apparent that there have been long periods of time when none of the property was inundated by water from continguous or adjacent navigable waters. Indeed, this has been true most of the time.

This finding notwithstanding, Judge Kennedy concluded the land had been "inundated".

Her decision then addressed the question of whether the inundation was periodic. The Court found, on the basis of water levels recorded over 80 years, the land had been inundated no more than four to six times. Again, recognizing the "somewhat arbitary" nature of her decision Judge Kennedy held that while five occurances in 80 years was not "periodic", six occurances in 80 years was "periodic". (30-31A, Appendix). On this basis, Riverside was enjoined from filling its land south and east of a specified elevation.

The District Court's second opinion, issued on June 21, 1979, followed trial. The District Court focused on its determination that the contiguous navigable waters do not contribute to the

vegetation on Riverside's property, except for such portions of the property as have been inundated, and then only for the period of induation. The Court relied heavily on Riverside's expert witness, Thomas Gough, whose testimony indicated that the conditions on the land resulted from the nature of the soil and would not change whether it was found near Lake St. Clair or several miles inland. (36-37A, Appendix). Judge Kennendy, nonetheless, permanently enjoined further filling.

Appeals were taken.[4]

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4 The District Court also held one of the Corps permit processing regulations was unconstitutional. (37-41A, Appendix). When Riverside appealed from the Courts jurisdictional decision the Corps filed a cross appeal. The Sixth Circuit held the issue raised by the Corps' appeal was moot in light of its ruling on Riverside's appeal. The Courts declined to "pass unnecesarily on the constitutionality of the Corps regulation." (18A Appendix). That issue is not discussed herein.

3. The Issue on Remand. While the case was on appeal before the Sixth Circuit, the Corps moved, and Riverside consented, to remand the case for reconsideration in light of certain regulations promulgated by the Corps in 1977, after Judge Kennedy's opinion and injunction was issued. The Corps' CWA "freshwater wetland" definition upon which the injuction and opinion was based had been modified. The Corps issued a new definition together with an extensive explanation. A CWA "wetland", 33 C.F.R. 323.2(c), was now defined as:

> Those areas that are inundated or saturated by surface or ground water sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similiar areas.

On remand the Corps presented no new evidence, but relied on the evidence presented earlier, when the focus was on

the inundation of the land. The Corps argued that inasmuch as the amended definition deleted the word "periodic" it was broader than the previous version. (Tr. 4-30-77, 11). District Court Judge Gilmore, successor to Judge Kennedy on the District bench, agreed. He held that if the facts as found by Judge Kennedy supported her decision on a narrower definition, those same facts support the same decision based on a broader definition. The permanent injunction was continued. (42-44A Appendix). Appeals were renewed.

4. The Decision on Appeal. The issue before the Sixth Circuit was whether the relevant facts found by Judge Kennedy and applied under the 1975 CWA "wetlands" definition supported the same holding when applied under the 1977 CWA "wetlands" definition. The Appeals Court recognized

that the narrow jurisdictional issue before it turned on both the definition and interpretive guidelines issued with the amended definitions. The Court saw four such interpretive guidelines as critical. Two are mentioned here.

The preamble states the Corps' position that the "abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (July 19, 1977). The Court coupled this statement with the preamble's admonition to look at the aquatic system "as it exists and not as it may have existed over a record period of years", to form its guidelines for interpreting the Corps' definition. The Court, (10-11A Appendix), stated:

> It does not necessarily follow, however, that because an area has been flooded five times in more than eighty years that, "as it exists" now, it is "inundated at a frequency and duration sufficient to

support and that under normal circumstances (does) support" wetlands vegetation. The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of such vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Were this not so, then areas which inexplicably support some species of aquatic vegetation, but which were not normally inundated, would fall within the wetlands definition. Such perverse result could not have been what the Corps contemplated in promulgating the regulation. Indeed, as noted earlier, the Corps expressly adverted to the situation of "areas that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasized that suchlands were not intended to be covered by the regulations.

Turning now to the facts as found by Judge Kennedy, and applying our interpretation of the new wetlands definition to those facts,

we conclude that the Riverside land is not a wetland.

The Appeals Court held the government's case factually insufficient under the amended definition and vacated the injunction. It further noted the existence of "a very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps". (15A, Appendix). However, the Appeals Court utilized a standard tenent of statutory construction and purposely avoided either an extended discussion of, or holding on, the Constitutional issue. (15A, Appendix).

Thus, the decision of the Court was confined to the jurisdictional issue based on the definitions and the Corps' interpretive guidelines. As will be shown herein, the Court's decision was correct and constitutes neither the repudiation of the CWA "Wetlands" definition nor a truncation of the Corps'

Section 404 jurisdiction as claimed by Petitioner.

REASONS THE PETITION SHOULD BE DENIED

1. The Sixth Circuit did not invalidate any portion of the Corps 404 program whatsoever. In fact, the Court made no reference to the Corps' jurisdictional regulations, and other than the definition of a CWA "wetland", no current regulation was cited by the Court. The Court held only that the Riverside property was not subject to the Corps' CWA jurisdiction.[5] Petitioner, in its brief represents that the holding was an invalidation of the

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5 It is evident from other parts of the Sixth Circuit's opinion that the Court purposely avoided a broad holding. In holding a separate issue raised by the Corps on appeal was moot the Court stated, "We should not pass unnecessarily on the constitutionality of the Corps regulations. (18A, Appendix).

administrative definition of "Waters of the United States". (Petitioner's brief, p.6). Petitioner, however, does not refer to any language from the Court's opinion to support its assertion. Indeed, there is no such language.

The assertion that the Court's singular focus on the inundation portion of the CWA "Wetland" definition invalidates that portion of the definition which includes areas saturated by surface or ground water clearly overstates the holding. The Appeals Court focused on inundation because this is an inundation case. The Corps' definition of a CWA "wetland", at the time this action was brought, did not mention saturation. It required "periodic inundation", 33 C.F.R. 209.120 (d)(2)(i)(h)(1976), and that is the requirement upon which the District Court first based its decision. On remand the Corps' argument and the District

Courts decision, continued to focus on inundation. (Tr. 4-30-81, 11). The Sixth Circuit maintained the focus on inundation, and further noted that it should have made it clear to Judge Gilmore that inundation was the subject of inquiry on remand.[6] (10A, Appendix). The Appeals Court analyzed the changes in the two definitions, devoted a substantial portion of its opinion to the factual determination of "periodic inundation" and quoted the relevant definition three times sans the saturation language. Thus it is

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6 Petitioner's attempt to raise the issue for the first time on appeal must fail. There was no finding by the District Court on the question of inundation and to suggest the facts allow such a finding now is pure speculation. If anything, the facts suggest the land is not saturated. The Corps clarified that saturation means water to the soil surface. 48 Fed. Reg. 21474 (May 1983). Soil borings taken at the property suggest that the water table was nearly seven feet below the soil surface on some portions of the land. (Tr. 12-6-77, 28-31).

clear that the Sixth Circuit Court's singular focus on inundation represents only that the Court realized the question of saturation was not before it. Moreover the Court never held that "saturation by surface or groundwater" is categorically insufficient for a CWA "wetland" classification.

2. Riverside contends that the approach of the Appeals Court in applying the amended definition to the facts without questioning the validity of the jurisdictional rules was correct. The Appeals Court recognized that the term "wetland", as used by the Corps, is a jurisdictional term of art. Hence, the term "wetland", does not encompass all parcels which either the general public or the scientific community may regard as a wetland. Avoyelles Sportsmen's League, Inc. v Marsh, 511 F. Supp. 278, 288 (W.D. La. 1981), rev'd on other grds, 715 F.2d

897 (5th Cir. 1983) In fact, the Corps has consistently acknowledged that its definition does not encompass all wetlands.[7] Thus, the Sixth Circuit's wetland determination was correct as Riverside's property is not inundated at a frequency and duration sufficient to support, and that under normal circumstances, does support,a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. 323.2(c). The hydrological source of what vegetation there is on the property is the sub-surface nature of the soil. As the expert testimony demonstrated, neither the "four to six" inundations over the past

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7 At 45 Fed. Reg. 85341, the Corps stated, "Many wetlands are waters of the United States." Since the term "waters of the United States", 33 C.F.R. 323.2(a), includes "wetlands" a given site may be a generic wetland without being a CWA "wetland". The Corps need only have said all wetlands are "waters of the United States" if it thought otherwise.

eighty years nor the proximity of the land to Lake St. Clair had an impact on the soil conditions.

3. Riverside contends that the Sixth Circuit's reliance on the Corps interpretive guidelines was correct. Where the Corps first definition of a CWA "wetland" required a showing of "periodic inundation" the amended definition required a factual showing of "inundation at a frequency and duration sufficent to support, and that under normal circumstances [does] support" wetland vegetation. 33 C.F.R. 323.2(c) (1983). The Appeals Court looked straight to the Corps for guidance in applying the new definition and found four admonitions in the preamble to the amended definitions.[8] 42 Fed. Reg. 37128 (1977).

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8 Those guidelines are mentioned in the statement above and were set out by the Sixth Circuit in its opinion (8-9A, Appendix).

The Court's use of the Corps interpretive guidelines is in full accord with the well established principal that an agency's interpretation of its own regulations is entitled to deference by a reviewing Court. Ford Motor Credit Co., v. Milhollin, 444 U.S. 555, 556 (1980); Udall v. Tallman, 380 U.S. 1, 16 (1965). Riverside contends that the Corps' interpretative guidelines strongly militates against the imposition of CWA jurisdiction under the present facts relating to inundation and lack of saturated soils. Further, it is clear that CWA jurisdiction is questionable[9] where there is no hydrological connection to "waters of the United States" and the

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9 The present facts may well present the "extravagant reach" of Corps jurisdiction questioned recently in United States v. Tilton, 705 F.2d 428 (11th Cir. 1983).

"acquatic" vegetation comprises, at best, a generic wetland. Hence, Petitioner's present position is in degradation of its own interpretive guidelines and thus, beyond the scope of laudatory deference.

When the Appeals Court turned to the facts, it noted Judge Kennedy's finding that "the source of this vegetation was the type of soil found on the property and not the few instances of flooding." (11A, Appendix). Having deferred to the Corps interpretation of its own language, the Court (11-12A, Appendix) stated:

> Thus she did not find, and on the evidence presented could not have found, that the land, as it exsists now, is "inundated" at a frequency and duration sufficient to support, and that under normal circumstances [does] support" the wetlands vegetation.

In conclusion, the Court's use of and reliance on the Corps interpretations of its own regulation finds ample support in the law and was not error.

4. The Sixth Circuit's approach and holding recognized and was consistent with the intent of the Congress in enacting the CWA. In making its decision the Sixth Circuit noted the express references to legislative intent contained in the enactment. The stated objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of of the Nation's waters." 33 U.S.C. 1251(a) (emphasis added). The Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C.1251(a)(1)(Emphasis added).

The Appeals Court also noted that the "navigable waters" which Congress meant to protect are defined in the CWA itself as "the waters of the United States, including the Territorial seas." 33 U.S.C. 1362(7). It properly recognized that "Congress may, indeed, have meant to

extend the protections of the Act beyond the straightforward definition it provided of "navigable waters." (13A, Appendix).

Riverside contends it is thus incorrect to state that the Court failed to consider the legislative history. Therefore, Riverside contends that the Sixth Circuit's decision regarding the reach of CWA "wetlands" jurisdiction was consistent with the Congressional mandate. Moreover, the Fifth Circuit's decision in Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d. 897 (5th Cir. 1983) made an extended search of the legislative history unnecessary. In Avoyelles Sportsman's League, supra, the Court held that the Corps' "wetland" definition was consistent with the intent of the CWA and the Sixth Circuit so noted. (13A, Appendix).

It is important to note that wetlands preservations was not an object of

legislative intent. The 1972 version of the CWA did not even mention or define "wetlands." The CWA, in 1972, focused on controlling water pollution, particularly industrial and municipal sewage pollution and was still known as the Federal Water Pollution Control Act. Though it is clear that Congress intended that the Act reach more waters than those which met the Corps traditional definition of "navigable waters", it is by no means clear that Congress intended to include wetlands within the reach of the Act. The Senate Conference Committee explained that (118 Cong. Rec. 33699 (1972)(Emphasis added):

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams and rivers regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may

be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters whould have a substantial economic effect on interstate commerce.

Despite references in the legislative history to "wetlands" during Congress'[10] consideration of the the 1977 amendments to the CWA, the Act still does not mention wetlands except in the context of delineating the role of the states vis-a-vi the federal government. 33 U.S.C. 1344 (g)(1).[11] Hence, it is legitimate to conclude that vigorous "wetlands" protection pursuant to the CWA was only

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10 See, for example, 1902 Atlantic Lts., v. Hudson, 19 Envtl. Rep. Cas. (BNA 1927 (E.D. Va 1983) for one Court's review of Congressional debate.

11 On August 2, 1984, the Environmental Protection Agency approved the State of Michigan's assumption of the Section 404 program pursuant to 40 C.F.R. 233 (1980). Michigan's 404 Program, Envtl. Law Inst. (1984)

included as part of the Corps' regulatory jurisdiction subsequent to statutory enactment and thus was an afterthought.

That the CWA was not and did not become a wetlands protection act in 1977 is reflected in a comprehensive report on wetlands prepared by Congress' Office of Technology Assessment (OTA). Office of Technology Assessment, Congress of the United States, OTA-O-206, Wetlands, Their Use and Regulation (1984). The report states at 167:

> There are fundamental differences in the way Federal Agencies and various special interest groups interpret the intent of Section 404 of the Clean Water Act (CWA). The United States Army Corps of Engineers views its primary function in carrying out the law as protecting the quality of water. Although wetland values are considered in project reviews, the Corps does not feel that Section 404 was designed specifically to protect wetlands.

Further, the Chief of the Corps' Regulatory Functions Branch, Bernard N. Goode, recently commented, "Section 404

was never designed to protect wetlands but rather to control the discharge of two types of pollutants into the nation's waters - dredged material and fill." Goode, The Public Interest Review Process, National Wetlands Newsletter, Envtl. Law Inst., Jan. 1981, 6-7.

Additionally, the need to clarify the record on the intent of Section 404 was addressed by the Presidential Task Force in a recent report on reforming the 404 program. The report, Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (May 7,1982) at 4 states:

> The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed

them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological intergrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

Riverside contends that an analysis of pertinent indicia of legislative intent indicates that the Sixth Circuit's decision is consistent with the intent of Congress in its implimentation of the CWA. By requiring the Corps to factually establish only that which its definition requires-inundation at a frequency and duration sufficient to support aquatic vegetation-the scope of Section 404 remains oriented to Congress' objectives

without becoming the federal land use regulation which Congress did not intend. To suggest under such circumstances that the Court's decision is inconsistent with Congress' intent is to suggest that the CWA was intended to be a wetlands preservation scheme.

5. The Sixth Circuit's decision is entirely consistent with decisions rendered by other circuits. The Sixth Circuit neither held nor stated that the Corps jurisdiction was limited to the traditional navigable waters. Moreover, as mentioned above, the Court explicity recognized both that the Corps' jurisdiction extends beyond the straightforward definition of "navigble waters" Congress provided and that the Corps' CWA "wetlands" definition was held to be consistent it the intent of the Congress. The Sixth Circuit held only that the Corps must first satisfy, by

factual proof, its own jurisdictional definition. Asserting that the Court repudiated a long line of precedent without having discussed that precedent exemplifies the extent to which Petitioner has overstated the Sixth Circuit's holding.

In each case cited by Petitioner for the proposition that there is a conflict among the circuits, the Corps jurisdiction was either proven by sufficient evidence or admitted.[12] Further, it is difficult to draw too much guidance from other cases since the determination of jurisdiction necessarily rests on the facts of each case. For example, in United States

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12 For example, in United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979), the defendants acknowledged the Corps had jurisdiction. In Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) the Court found, as here, the Corps jurisdiction extended beyond the traditional navigable waters but expressed no opinion on the outer limits to which the Corps' CWA jurisdiction might extend.

v. Bradshaw, 541 F. Supp. 880 (D. Md. 1981)(the area subject to jurisdiction was found to be tidally influenced). See also, United States v. Weisman, 489 F. Supp. 1331 (M. D. Fla. 1980)(frequent flooding by tidal action); Hough v. Marsh, 557 F. Supp. 74, 80 n. 4 (D. Mass. 1982)(where the Court found the regulations clearly applicable); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979)(Defendant conceded jurisdiction, property inundated by lake waters); United States v. Ciampatti, 583 F. Supp. 483 (D. NJ 1984)(property subject to tidal inundation); United States v. DeFelice, 641 F.2d 1169 (9th Cir. 1981)(fill placed in a tidal canal).

There is an important distinction to be made between holding that the Corps has broad jurisdiction under the CWA, as the Sixth Circuit and many other Courts have held, and holding that the Corps has

jurisdiction in a given factual setting. The later does not necessarily follow from the former and holding, as the Sixth Circuit did, that the Corps failed to establish its jurisdiction in this particular instance constitutes neither a repudiation of the Corps jurisdiction nor a conflict among the circuits.

6. Petitioner's argument that the Sixth Circuit's Fifth Amendment, U.S. Const. Amend. V (Takings Clause), concerns were not legitimate is flawed for its promotion of a superficial analysis of the issue. A careful analysis of the Sixth Circuit's decision reveals, first, that it does not a narrow the Corps' jurisdiction and, second, that the result reached by the Court was due to the facts of the case and not its discussion of Fifth Amendment concerns.

Petitioner maintains the Sixth Circuit read this Honorable Court's

decision in Kaiser Aetna v. United States, 444 U.S. 164 (1979) to require a narrow interpretation of the Corps jurisdiction. As has been repeatedly stated, the Court did not restrict the jurisdiction of the Corps in any manner except to require that it follow its own definitions. The Sixth Circuit recognized the principal significance of Kaiser Aetna, supra, to be that the navigable servitude, which necessarily permeates a discussion of Corps jurisdiction, never creates a blanket exception to the Fifth Amendment Taking Clause.[13] The Appeals Court did not hold that subjecting Riverside's

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13 The CWA is an enactment based on Congress' plenary powers under the Commerce Clause. It is not a police power measure pursuant to the Tenth Amendment, U.S. Const. Amend. X, as in the nature of a zoning ordinance. There has been no determination by Congress that the "paramount public interest" associated with the navigable servitude analysis extends to those properties clearly outside the scope of the navigable servitude yet allegedly within the

property to regulation would constitute a taking. Rather, the Court properly and purposely invoked a well established rule of statutory construction to avoid further inquiry into the issue. 2A Sutherland on Statutory Construction, 45.11, at 33-34 (C. Sands ed. 1973) cited by the Court provides that "the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another."

The Sixth Circuit's mention of its

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jurisdiction of the CWA. Therefore, any Fifth Amendment analysis of a CWA "wetland" taking problem should be analogous to the approach taken by this Court in interpreting the Commerce Clause in Kaiser Aetna v. United States, 444 U.S. 164 (1979), rather than the traditional Tenth Amendment analysis utilized in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) and San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) as suggested by Petitioner.

Fifth Amendment concerns was not central or even necessary to its decision on the narrow jurisdictional question before it. The Appeals Court had already decided the government's proof was factually insufficient before discussing its Fifth Amendment concerns. The brief discussion that followed its statement of its holding is therefore dicta. As this Honorable Court has stated, "[B]road language ... unnecessary to the [c]ourt's decision ... cannot be considered binding authority." Kastigar v. United States, 406 U.S. 441, 454-55 (1982).

It is important to note that though the Sixth Circuit's discussion of the Fifth Amendment is obiter dicta, other Courts have addressed the issue and recognized the difficult problem of the appropriation of legitimate private ownership interests in the context of CWA "wetland" cases. Those cases have found

such concerns to be real and legitimate. United States v. Tilton, 705 F.2d 428 (11th Cir. 1983); 1902 Atlantic Ltd. v. Hudson, 19 Envlt. Rep. Cas. (BNA) 1927 (E.D. Va. 1983).[14]

7. Environmental considerations alone are insufficient to authorize the imposition of CWA jurisdiction. Environmental considerations apply only once jurisdiction to act is established. 40 C.F.R. 230 (1983). Throughout its brief, Petitioner has interwoven discussion of the Corps jurisdictional definitions with mention of environmental considerations. Petitioner's approach does a disservice to this Honorable Court's evaluation of the Sixth Circuit's

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14 1902 Alantic, supra, also recognizes that the Tucker Act, 28 U.S.C. 1491, et seq., does not divest a reviewing Court of juisdiction to discuss a taking issue particularly where there is no issue of monetary compensation.

decision. The Corps' regulations, like those of many governmental agencies, expressly define the scope of their jurisdictional authority. The regulations are not an end in themselves. Rather, they are a means to act and carry with them recognition of the inherent limitations on government to act. There are, then, conceivable factual situations beyond the reach of the regulations as the Corps itself has recognized. Riverside contends that this case presents such an example. The decision of the Sixth Circuit should not be viewed as placing a limit on the legitimate exercise of the Corps' authority to act once the Corps has established jurisdiction.

The factors involved in determining the Corps' jurisdiction and the factors involved in the permit process are separate and distinct. It is vital to bear this distinction in mind in

evaluating the Petition in this case. The unauthorized mix of the jurisdictional criteria with environmental criteria permits the Corps to transform the CWA into a wetlands preservation scheme and overlooks the fact that jurisdiction forms the very basis on which the Corps is authorized to act. Riverside contends that the Sixth Circuit properly required the Corps to first establish its jurisdiction and thus insured that the Corps follow its own regulations as it has promulgated them and as the other Courts have interpreted them.

The decision below does not purport to throw a blanket prohibition on the Corps section 404 program and it does not have that effect. Accordingly, the question of the millions of acres of land which the Corps claims, without any substantiation, will be effected by the decision below is simply not before this

Court. The regulation of those acres, as with the regulation of those owned by Riverside, must be decided on the basis of their own facts under the Corps regulatory definitions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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